

United States
Circuit Court of Appeals
For the Ninth Circuit.

JAMES A. DAGGS,

Appellant,

vs.

GROVER C. KLEIN, Rear Admiral, United States
Navy, Commandant, Mare Island Navy Yard
and JAMES V. FORRESTAL, Secretary of
the Navy,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

No. 11581

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

MESSRS. GLADSTEIN, ANDERSEN, RESNER
& SAWYER,

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United States Attorney,
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Post Office Building,
San Francisco, California.

Attorney for Defendants and Appellees.

In the United States District Court for the Northern
District of California, Southern Division

No. 25927 S

JAMES A. DAGGS,

Plaintiff,

vs.

GROVER C. KLEIN, Rear Admiral, United States
Navy, Commandant Mare Island Navy Yard;
JAMES V. FORRESTAL, Secretary of the
Navy,

Defendants.

COMPLAINT FOR REINSTATEMENT OF
CIVIL SERVICE EMPLOYEE AND FOR
COMPENSATION

Plaintiff complains of the defendants above named
and for cause of action against said defendants al-
leges:

I.

The matter in controversy exceeds, exclusive of
costs or interest, the sum of three thousand dollars
(\$3,000) and arises under the Constitution and Laws
of the United States.

II.

That during all of the times herein mentioned
plaintiff was and now is a citizen of the United
States, being born in [1*] Allendale, State of Illi-
nois, on the 7th day of March, 1889, and now resid-

* Page numbering appearing at foot of page of original certified
Transcript of Record.

ing in the City of Vallejo, County of Solano, State of California.

III.

That during all times herein mentioned plaintiff was and now is a member of the Free and Accepted Masons, and at the time of his removal as hereinafter set forth plaintiff was a member of the United Federal Workers of America, Congress of Industrial Organizations.

IV.

That from November 6, 1926, until being discharged in June, 1941, plaintiff was a Federal Civil Service employee at the Mare Island Navy Yard, located at Mare Island, California, commencing as a second class machinist and at the time of discharge, as hereinafter set forth, was serving as first class machinist, receiving \$8.96 pay per day.

V.

That defendant Grover C. Klein, Rear Admiral, United States Navy, now is the duly appointed and acting Commandant of the Mare Island Navy Yard, succeeding W. L. Friedell, Rear Admiral, United States Navy, as said Commandant; that during all times mentioned herein said defendant Klein and said Friedell were acting with the knowledge and approval of the Secretary of the Navy.

VI.

That defendant James V. Forrestal is the duly appointed and acting Secretary of the Navy of the United States.

VII.

That on the 28th day of June, 1940, the Congress of the United States passed the Act of June 28, 1940, Public Law Number 671, 76th Congress, 54 Stat. 676, Tit. 50 U.S.C.A. App. Sec. 1156, providing in part as follows: [2]

Provided further, That during the national emergency declared by the President on September 8, 1939, to exist, the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555; 5 U.S.C. Sec. 652), shall not apply to any civil service employee of the War or Navy Departments or of the Coast Guard, or their field services, whose immediate removal is, in the opinion of the Secretary concerned warranted by the demands of national security, but nothing herein shall be construed to repeal, modify, or suspend the proviso in that section. Those persons summarily removed under the authority of this section may, if in the opinion of the Secretary concerned, subsequent investigation so warrants, be reinstated, and if so reinstated shall be allowed compensation for the period of such removal at the rate they were receiving on the date of removal. And provided, further, That within thirty days after such removal any such person shall have an opportunity personally to appear before the official designated by the Secretary concerned and be fully informed of the reasons for such removal, and to submit, within thirty days thereafter, such statement

or affidavits, or both, as he may desire to show why he should be retained and not removed.

VIII.

That on or about the 30th day of June, 1941, plaintiff was discharged from his employment at the Mare Island Navy Yard and was thereafter, on the 24th day of July, 1941, personally informed by said Friedell, then Commandant of said Navy Yard, that the reason for the discharge was as follows:

Since September, 1939, the United States of America has been under a condition of emergency which has now been declared by the President to be unlimited. Under this condition, in spite of the very liberal governmental labor policy in the employment of its citizens, it has been incumbent upon all of its employees so to conduct themselves that there should be not the least concern on the part of their associates or their administrative officials as to their unquestioned adherence to the principles of the government and their loyalty in furthering its defense against enemies within or without.

Despite the constitutional rights of individuals as to freedom of speech and political opinion, these rights are not directly concerned in the right to actual employment in a governmental activity. This, each individual must maintain for himself by the correctness of his attitude and his behaviour.

Mr. Daggs, your discharge was warranted by the demands of national security and was made

from this Navy Yard because a confidential investigation disclosed that you do not possess the requisite degree of loyalty to the United States to remain an employee at this Navy Yard since you have been actively associated with members of and attending meetings of [3] an organization which advocates the overthrow of the constitutional form of government of the United States. You are advised that within thirty days from the date of this interview, Thursday, July 24, 1941, you have the privilege of submitting any statement or affidavit, or both, which you may desire to show why you should be retained and not discharged. These must be submitted in writing.

IX.

That thereafter plaintiff informed said Friedell in writing as follows:

In regards to the charges against me from the Navy Yard, here is my statement.

I went to work on the Navy Yard Nov. 6, 1926. In that time I have put in about 13 years. I took an interest in my work and I always call my supervisor's attention to anything that was not right; my supervisor had me inspect the work of the other men when a job was finished.

The last 4 years I have worked from 4 to 12 P.M., and week ends I work on my ranch so I have had no time to associate with members or organizations which would or would not advocate the overthrow of the Constitutional form of Government of the United States.

I only belong to the United Federal Workers of America (C.I.O.) Union, and the Masonic Lodge. If either one of these organizations advocate the overthrow of our form of government I would like to be informed of that. Furthermore I have not attended any meetings of any kind, not even the Union or Masonic Lodge, and whoever investigated me and says that I had been to any meetings or that I am active in any organization or whatever it is I am supposed to have done, I say, "It is a lie," and I would like to meet that person face to face and have them prove when I attended these meetings, and what associations or organizations I belong to outside of the two mentioned.

X.

That plaintiff has made repeated demands upon defendants and the said Friedell that he be fully informed of the reason for his removal as provided for in said Public Law No. 671 hereinabove set forth, and for reinstatement as a civil service employee at the Mare Island Navy Yard together with compensation for the period of removal as provided for in said Public Law No. 671; that defendants and said Friedell have unlawfully failed and refused to fully inform [4] plaintiff of the reasons for the removal of plaintiff from said employment or to reinstate or compensate plaintiff; that plaintiff has at no time been fully informed of the reasons for his discharge and the only reasons given to plaintiff are those hereinabove specified in the statement made

by Friedell; that said statements were and are too vague and indefinite to enable plaintiff to prepare and submit the statements or affidavits referred to in Public Law 671 to show why plaintiff should be retained and not removed; that plaintiff believes that any further efforts to procure voluntary action on the part of defendants would be useless.

XI.

That plaintiff was and is entitled to the notice and hearing provided for by Congress in said Public Law No. 671 as a condition precedent to the removal of civil service employees; that the arbitrary and capricious failure and refusal of defendants and Friedell to afford plaintiff the right to the said notice and hearing was and is in excess of the authority vested in defendants and Friedell by Congress and constitutes a violation of said Public Law No. 671 and a violation of the right of plaintiff to due process of law as provided for in the 5th Amendment to the Constitution of the United States.

XII.

That the only stated ground upon which plaintiff was discharged was that he had been actively associated with members of and attending meetings of an organization which advocates the overthrow of the constitutional form of government of the United States; there was not and is not any charge that the alleged activities of plaintiff evidenced a working alliance with said unnamed organization to bring the said purpose to fruition. In that connection plaintiff alleges that during all times herein mentioned

his entire course of conduct prior to his dismissal was [5] and now is for the attainment of wholly lawful objectives. Plaintiff further alleges that without being informed of the name or identity of the said organization, the ground for the discharge of plaintiff as specified made meaningless and abortive the provision in Public Law No. 671 giving to a discharged person, after being fully informed of the reasons for the removal, the right to file such statements or affidavits, or both, as he may desire to show why he should be retained and not removed, in that without being informed of the name or identity of said organization plaintiff was denied the right to set forth in any statement or affidavit whether he was actively associated with said organization and, if so, whether the organization did espouse the overthrow of the constitutional form of government of the United States and if the organization did espouse such an objective whether the acts of plaintiff evidenced a working alliance with said organization to bring its program to fruition.

XIII.

That plaintiff is wholly without remedy in the premises and unless this court directs the defendants to reinstate plaintiff with compensation for the period of removal as provided for in Public Law No. 671 that plaintiff will suffer irreparable injury.

XIV.

That at the time of the removal of plaintiff as aforesaid there was due plaintiff certain accrued leave with pay amounting to approximately one hun-

dred fifty dollars (\$150.00); that defendants have failed and refused to pay said amount or any part thereof to plaintiff.

Wherefore, plaintiff prays judgment:

1. That defendants be ordered forthwith to reinstate plaintiff as a civil service employee at the Mare Island Navy [6] Yard in the same capacity in which plaintiff was working at the time of his discharge.

2. That defendants be ordered to compensate plaintiff for the period of his removal at the rate of pay plaintiff was receiving on the date of his discharge.

3. That defendants be ordered to reinstate the right of plaintiff to accrued leave with pay as the same existed on the date of discharge.

4. For such other and further relief as the court may deem proper in the premises.

GLADSTEIN, ANDERSEN,
RESNER, SAWYER & EDISES.

/s/ By HERBERT RESNER

And

/s/ MYER C. SYMONDS,

Attorneys for Plaintiff. [7]

State of California,

City and County of San Francisco—ss.

James A. Daggs, being first duly sworn, deposes and says:

That he is the plaintiff named in the within action; that he has read the foregoing complaint and

knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters that he believes it to be true.

JAMES A. DAGGS.

Subscribed and sworn to before me this 29th day of April, 1946.

[Seal] /s/ ALICE C. MORSE,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed May 6, 1946. [8]

[Title of Court and Cause.]

MOTION TO DISMISS

Now comes the defendants James V. Forrestal, Secretary of the Navy, appearing herein specially, and for no other purpose and objecting to the jurisdiction of the Court over him and Grover C. Klein, Rear Admiral United States Navy, Commander, Mare Island Navy Shipyard, by Frank J. Hennessy, United States Attorney, and William E. Licking, Assistant United States Attorney, and move the Court to dismiss this suit on the following grounds:

I.

As to the defendant James V. Forrestal, appearing specially, the Court lacks jurisdiction over his person since said defendant has his official residence in the District of Columbia and is not an inhabi-

tant, resident or citizen of California (28 U.S.C. 112) and has not consented to be sued in this Court and does except to the jurisdiction of this Court and to the venue of these proceedings.

II.

That the Court lacks jurisdiction over the subject matter of the Complaint;

III.

That the suit is in effect against the United States which has not consented to be sued in such a case;

IV.

That the Complaint fails to state a cause of action against defendants or any of them on which relief can be granted;

V.

That the suit may not be maintained in the absence of the principal defendant, James V. Forrestal, Secretary of the Navy, who, because any determination herein will effect his rights, orders and statutory responsibilities and duties, [9] is an indispensable party, who has not been and cannot without his consent be subjected to the jurisdiction of this Court.

Wherefore, defendants pray that said Complaint be dismissed with prejudice.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ WILLIAM E. LICKING,
Asst. United States Attorney,
Attorneys for Defendants.

NOTICE OF MOTION

To: Plaintiff above named, and to Messrs. Gladstein, Andersen, Resner, Sawyer & Edises, 250 Montgomery Street, San Francisco, 4, California, his attorney:

Please Take Notice that the undersigned will bring the attached Motion to Dismiss on for hearing before this Court at Room 338 Post Office and Court House Building, City and County of San Francisco, California, on the 16th day of September, 1946; at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ WILLIAM E. LICKING,
Asst. United States Attorney,
Attorneys for Defendants.

[Endorsed]: Filed Sep. 3, 1946. [11]

[Title of District Court and Cause.]

MEMORANDUM OPINION ON MOTION TO
DISMISS AND ORDER DISMISSING ACTION

Plaintiff Daggs brought this action in May, 1946, against Rear Admiral Grover C. Klein as Commandant of the Mare Island Navy Yard, and James V. Forrestal as Secretary of the Navy. The relief sought is a mandatory order directed to defendants

compelling them (a) to reinstate plaintiff as a civil service employee at Mare Island in the same capacity in which he was serving when he was discharged; (b) to compensate plaintiff for the period of his removal at the same rate of pay he was receiving when he was discharged; and (c) to restore to plaintiff his right to accrued leave with pay.

Government counsel representing defendants "appeared specially" and moved to dismiss the action with prejudice, on the grounds that the Court had no jurisdiction of the subject matter or of Secretary Forrestal and that the complaint fails to state a claim upon which relief could be granted. The motion was supported by a showing [12] that Secretary Forrestal had not been served with process, that he had not waived service and that he had not appeared except to challenge jurisdiction of the court. On the remaining grounds of the motion the argument was, in substance, that it is apparent from the complaint that the alleged wrongful conduct of the Secretary of the Navy was, under the statute pleaded, discretionary and that discretionary power lawfully conferred and duly exercised is not subject to judicial interference; that the forum of plaintiff's action is the Court of Claims; and that the action is, in effect, an action against the United States. These arguments were supported by persuasive authority. Nevertheless, for reasons hereafter appearing, if no motion to dismiss had been filed, the Court, *sua sponte*, would have and does now observe that it lacks jurisdiction to entertain the cause.

Jurisdictional allegations are that the matter in controversy exceeds, "exclusive of costs or interest, the sum of (3000) and arises under the Constitution and Laws of the United States." (Jud. Code §24 (1), 28 U.S.C.A. §41(1). The complaint makes no other reference to the Constitution. The law pleaded is the Act of June 28, 1940, Public Law 671, 76th Congress, 54 Stat. 676, 50 U.S.C.A. App. §1151-1156). Plaintiff predicates his action on § 6 of that Act, which provides for reemployment of returned employees under the Civil Service Retirement Act of May 29, 1930, for suspension of retirement annuity payments during reemployment; deductions for annuity retirement, etc., all of which is preliminary to the following proviso: [13]

"That during the national emergency * * * the provisions of the Act of August 24, 1912 * * * shall not apply to any civil service employee of the War or Navy departments * * * whose immediate removal is, in the opinion of the secretary (of the Navy) concerned, is warranted by the demands of national security * * * Those persons summarily removed may, if in the opinion of the Secretary concerned and subsequent investigation so warrants, be reinstated, and if so reinstated shall be allowed compensation for the period of such removal at the rate they were receiving on the date of removal* * *."

The Section further provides that within 30 days after removal a removed person may appear and be

fully informed of the reason for his discharge and thereafter, within 30 days, he may make statements or affidavits of why he should be retained and not removed.

In substance, and so far as now pertinent, the complaint alleges that from November 6, 1926, to June 30, 1941, plaintiff was a federal civil service employee at Mare Island; that on or about the last mentioned date he was discharged by Rear Admiral W. L. Friedell, then Commandant of the Navy Yard; that on July 24, 1941, plaintiff was advised in writing by Friedell that his discharge was warranted by the demands of national security because a confidential investigation had disclosed that he did not possess the requisite loyalty to the United States by reason of his active association with an organization which advocated overthrow of the constitutional form of government of the United States; that thereafter plaintiff informed Friedell in writing (of facts on which he relied for his retention together with his personal opinion) why he should not have been discharged; that repeated demands had been made on defendants and Friedell that plaintiff be fully informed of the reasons for his removal and for compensation; that defendants and Friedell had unlawfully failed and refused (to comply); and that [14] plaintiff is without a remedy unless this court orders the relief prayed.

On its face the complaint shows that this action does not arise under the Constitution or any law of the United States. In other words no federal question is presented. (See *Leather Manufacturers*

Bank v. Cooper, 120 U.S. 778; Campbell v. Chase National Bank, 2 Cir., 71 F. 2d. 669). To come within the jurisdiction of the District Court on the basis pleaded, more is required than that the right sought to be enforced originated in a federal law. (Cook County v. Cahumet Etc. Co., 138 U. S. 635). It is at least debatable whether or not plaintiff has a right of action and if so whether it originated in the law relied on. To arise under a law of the United States an action must involve a controversy respecting the validity, construction or effect of the law pleaded, upon the determination of which the result depends (Shulthis v. McDougal, 225 U. S. 561, 569; In Re Winn, 213 U. S. 458, 465; Fully v. First National Bank, 299 U. S. 109; Marshall v. Desert Properties Co., 9 Cir. 103 F. 2d 551; Chaskin v. Thompson, 9 Cir., 143 F. 2d 566; Bell v. Hood, 9 Cir., 150 F. 2d 97, 100; Barnhart v. Western Maryland Ry. Co., 2 Cir., 128 F. 2d 709; Miller v. Long, 4 Cir., 152 F. 2d 197).

The instant action has no relation to the validity, construction or effect of the law relied on. On the contrary the subject matter, if any, is the failure of Rear Admiral Friedell (who, by the way, is not a party defendant) and these defendants fully to inform plaintiff of the reason for his discharge; and this in the face of pleading the written evidence of such information. The fact, if it be a fact, that plaintiff is remediless has no place in considering the question or jurisdiction, which is statutory.

The action will be dismissed for lack of jurisdiction.

It Is So Ordered.

A. F. ST. SURE,

United States District Judge.

Dated: November 27, 1946.

[Endorsed]: Filed Nov. 29, 1946.

[Title of District Court and Cause.]

NOTICE OF APPEAL

(Under Rule 73(B))

Notice Is Hereby Given that James A. Daggs, Plaintiff above named hereby appeals to the Circuit Court of Appeals for the 9th Circuit from the Order of the above entitled Court dismissing the above-entitled action entered in this action on the 29th day of November, 1946.

Dated: January 10, 1947.

GLADSTEIN, ANDERSEN,

RESNER, & SAWYER,

HERBERT RESNER,

NORMAN LEONARD,

Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 21, 1947. [17]

[Title of District Court and Cause.]

DESIGNATION OF
RECORD ON APPEAL

Comes now James A. Daggs, plaintiff and appellant herein and designates the following as the record on appeal in the above entitled matter:

1. Complaint for Reinstatement of Civil Service Employee and for Compensation, filed herein on May 6, 1946.
2. Motion to Dismiss.
3. Memorandum Opinion on Motion to Dismiss and Order Dismissing Action, filed herein on November 29, 1946.
4. Notice of Appeal, filed herein on January 21, 1947.
5. This Designation of Record on Appeal.

Dated: January 23, 1947.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,
HERBERT RESNER,
NORMAN LEONARD.

Filed Jan. 30, 1947. [18]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellant herein may have to and including April 11, 1947, to file the Record on

Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: February 28, 1947.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed Feb. 28, 1947. [19]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO
TRANSCRIPT OF RECORD ON APPEAL

I. C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing nineteen pages, numbered from 1 to 19, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of James A. Daggs, Plaintiff, vs. Grover C. Klein, etc., et al., Defendants, No. 25927 S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$3.60 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at

San Francisco, California, this 18th day of March
A.D. 1947.

C. W. CALBREATH,
Clerk.

/s/ M. E. VAN BUREN,
Deputy Clerk. [20]

[Endorsed]: Received March 26, 1947.

Filed May 7, 1947.

[Endorsed]: No. 11581. United States Circuit Court of Appeals for the Ninth Circuit. James A. Daggs, Appellant, vs. Grover C. Klein, Rear Admiral, United States Navy, Commandant, Mare Island Navy Yard and James V. Forrestal, Secretary of the Navy, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed April 5, 1947.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11581

JAMES A. DAGGS,

Appellant,

vs.

GROVER C. KLEIN, Rear Admiral, United States
Navy, Commandant, Mare Island Navy Yard;
JAMES V. FORRESTAL, Secretary of the
Navy,

Respondents.

STATEMENT OF POINTS TO BE RELIED
UPON AND DESIGNATION OF PARTS
OF RECORD TO BE PRINTED

Comes now James A. Daggs, the appellant in the above-entitled cause, and states that the points upon which he intends to rely in this court in this case are as follows:

I.

That the Court below erred in granting respondents' motion to dismiss for lack of jurisdiction in that the Court below did have jurisdiction since it appears on the face of the complaint that the construction and application of a Federal statute is involved in this proceeding.

II.

Appellant further states that the whole of the

record as filed is necessary for the consideration of the case.

Dated: May 6, 1947.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER,

/s/ HERBERT RESNER,

/s/ NORMAN LEONARD,

Counsel for Appellant.

Receipt of foregoing Statement of Points hereby acknowledged this 7th day of May, 1947.

FRANK J. HENNESSY,
U. S. Attorney.

[Endorsed] Filed May 7, 1947.

